

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In Re Applications of	)	WT DOCKET NO. 96-41	
	)		
	)	File Nos.:	
LIBERTY CABLE CO., INC.	)	708777	WNTT370
	)	708778, 713296	WNTM210
For Private Operational Fixed	)	708779	WNTM385
Microwave Service Authorization	)	708780	WNTM555
and Modifications	)	708781, 709426, 711937	WNTM212
	)	709332	NEW
New York, New York	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	NEW
	)	717325	NEW

To: Administrative Law Judge Richard L. Sippel

**BARTHOLDI CABLE COMPANY, INC'S  
 OPPOSITION TO MOTION TO ENLARGE**

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May 7, 1996

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To: Administrative Law Judge Richard L. Sippel

**BARTHOLDI CABLE COMPANY, INC.'S  
OPPOSITION TO MOTION TO ENLARGE**

Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. (for convenience "Liberty," unless otherwise noted), hereby submits its Opposition to the Motion to Enlarge filed April 22, 1996 by Time Warner Cable of New York City and Paragon Cable Manhattan ("Time Warner") and the Supplement to Motion to Enlarge Issues filed April 29, 1996 by Time Warner (collectively the "Motion"). Relying on wholly unsupported assumptions, the Motion speculates that Liberty has effectuated an unauthorized transfer of control of its OFS microwave licenses, and seeks designation of additional issues against Liberty. As set forth below, the Motion is factually baseless and should be denied under well-settled Commission precedent.

## **I. INTRODUCTION AND SUMMARY**

The Goliath Time Warner cable monopoly has been relentless in its efforts to eliminate Liberty as a competitor and thereby stifle the development of meaningful competition in the New York City multichannel video programming distribution ("MVPD") market. True to its nature, Time Warner now seeks, through its Motion, to prevent the emergence of a stronger competitor with greater resources.

Time Warner's speculative efforts should be denied. As detailed below, Time Warner's pleadings are based on conjecture and surmise, and, as such, they fall woefully short of the factual specificity required of a motion to enlarge. Moreover, as is often the case with pleadings grounded only on conjecture, Time Warner's Motion is factually and legally incorrect. On February 20, 1996, Liberty and Freedom New York, L.L.C. ("Freedom") entered into an asset purchase agreement pursuant to which Freedom acquired Liberty's existing subscribers. This transaction will provide needed capital and expertise to substantially expand MVPD competition in the New York City market. Contrary to Time Warner's speculation, however, this agreement expressly excluded Liberty's existing OFS transmission business -- including its FCC authorizations and related transmission and reception equipment -- and did not confer upon Freedom any right of control or ownership of the licensed facilities. Consistent with FCC rules, Liberty and Freedom also entered into a transmission services agreement under which Liberty uses its existing authorizations and equipment to provide Freedom with microwave transmission services on a private carrier

basis. In sum, there is absolutely no basis for the Motion's allegations. The Presiding officer should deny the Motion.

**II. THE PRESIDING OFFICER SHOULD DENY THE MOTION BECAUSE ITS ALLEGATIONS ARE UNSUPPORTED AND MISTAKEN.**

Contrary to the dictates of Section 1.229(d), the Motion fails to include specific allegations of fact to support the requested enlargement of issues. The Motion alleges that Liberty has (1) illegally transferred control of its OFS facilities and, by so doing, (2) made misrepresentations to the Commission and (3) failed to amend the applications subject to this Hearing because they are no longer "substantially accurate and complete" within the meaning of 47 C.F.R. § 1.65(a).<sup>1</sup> Time Warner's Supplement repeats these claims and speculates as to the import of recent FCC application filings by Freedom.

In support of its allegations, Time Warner simply points to the agreement between Liberty and Freedom and surmises that an unauthorized transfer of control must have occurred. The Motion is woefully deficient. Indeed, the Commission has repeatedly determined that an issue will not be added to a hearing on the basis of such speculation and conjecture. *See, e.g., The Lutheran Church/Missouri Synod*, 10 FCC Rcd 9880, 9919 (1995); *Folkways Broadcasting Co., Inc.*, 33 F.C.C.2d 811 (Rev. Bd. 1972); *West Central*

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<sup>1</sup> Motion to Enlarge at 4-6.

*Ohio Broadcasters, Inc.*, 1 FCC Rcd 1178 (Rev. Bd. 1965).<sup>2</sup> As shown below, the Motion contains no credible factual allegations to justify addition of the requested issues to this hearing.

**A. The Agreements Between Liberty and Freedom Do Not Affect Liberty's Ownership and Control of its Microwave Facilities.**

Time Warner's conjecture that Freedom somehow controls Liberty or Liberty's FCC licenses is simply wrong. Pursuant to an asset purchase agreement entered into February 20, 1996, Freedom acquired certain assets from Liberty, including, in relevant part, Liberty's existing subscribers, certain assumed contracts, certain equipment and property interests used for the delivery of multichannel video programming, as well as the name "Liberty" and other intellectual property assets (the "purchased assets").

Liberty's OFS licenses and related transmission and reception equipment (the "licensed assets") were *expressly excluded* from the transaction. In consideration for the purchased assets, Liberty received an initial purchase price of \$25 million (plus reimbursement for certain construction costs), a promissory note for \$15 million (payable to the extent that Liberty or its marketing affiliate, LIVE, delivers to Freedom a certain number of subscribers), and a 19.9% ownership interest in the Freedom limited liability company.

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<sup>2</sup> See also *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (before designating an issue for hearing, the issue "must be clearly and adequately alleged, it must be factual, and it must rise to the level of a substantial and material issue.").

The licensed assets remain entirely in the hands of Liberty's successor, Bartholdi Cable Company, Inc.<sup>3</sup>

The parties also executed a transmission services agreement (the "Transmission Agreement") pursuant to which Liberty provides Freedom with microwave transmission capacity. Acting as a private carrier, Liberty provides this service using its FCC authorizations and related transmission and reception equipment. In exchange for provision of such service, Freedom pays Liberty a monthly fee. The Commission has specifically authorized and encouraged this type of arrangement.<sup>4</sup> Pursuant to the express terms of the

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<sup>3</sup> As Time Warner noted in its Motion to Enlarge, Liberty notified the Commission of its name change to Bartholdi. See Exhibit 1 to Motion to Enlarge.

<sup>4</sup> See 47 C.F.R. § 94.17 ("[l]icensees of radio stations authorized under this part may . . . offer service on a for-profit private carrier basis, subject to [certain] conditions and limitations."). These conditions include the following:

- (1) the communications carried by the private carrier service must be permissible under the eligibility provisions of 47 C.F.R. § 94.9, which include the distribution of video entertainment material in the 18,142-18,580 MHz band provided by Freedom;
- (2) the licensee must maintain access to and control over all facilities authorized under its license;
- (3) the private carrier's arrangements must be conducted pursuant to a written agreement that is kept with station records; and
- (4) the licensee must keep an up-to-date list of private-carrier subscribers and the basis of their eligibility under Part 94.

Liberty's provision of microwave transmission capacity to Freedom fully complies with all of these conditions. See also *Amendment of Part 94 of the Commission's Rules and Regulations to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service*, PR Docket No. 83-426 (First Report and Order), 57 Rad. Reg.2d (P&F) 1486 (1985) (FCC permits entrepreneurs to provide OFS communications services to others on a commercial, (continued...))

Transmission Agreement, Liberty continues to own and control the FCC authorizations needed to provide the transmission services and continues to own and operate the necessary network transmission and reception equipment.

**B. Time Warner's Claim that Liberty Misrepresented Itself Before the Commission is Belied By the Fact that Liberty Disclosed the Transaction to the Bureau.**

Far from misrepresenting the Liberty/Freedom transaction, as the Motion alleges, Liberty explicitly disclosed the transaction to the Bureau. On January 25, 1996, well prior to the consummation of the transaction, counsel for Liberty and for Freedom disclosed the basic structure of the deal to representatives of the Wireless Telecommunications Bureau. With the exception of the purchase price and the identity of the buyer, Bureau representatives

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<sup>4</sup>(...continued)

private carrier basis). The only significant restriction placed on such authority is that the entrepreneur serve entities that would be eligible on their own to hold a license under Part 94, as Freedom is here. The Commission did not alter this policy when it opened the 18,142-18,580 MHz band for the distribution of video entertainment materials to end users. *See Amendment of Part 94 of the Commission's Rules to Permit Private Video Systems of Video Entertainment Access to the 18 GHz Band*, 6 FCC Rcd 1270 (1991). Indeed, the *Order* stated

[i]n response to the suggestion advanced by [] commenters that we prohibit private carrier operation in the 18 GHz band . . . we find it necessary to underscore that the frequencies at issue in this proceeding are available to all OFS licensees whether or not they are engaged in the distribution of video entertainment materials.

*Id.* at 1272 n.46. Hence, not just video entertainment providers, but also entities offering underlying transmission services to video entertainment providers are eligible to use the 18 GHz band.



were apprised of all the above facts.<sup>5</sup> The Bureau officials at the meeting concurred in the view that no FCC approval or notification would be required to consummate the transaction because Liberty would retain exclusive ownership and control of its FCC OFS licenses, while lawfully entering into a private carriage arrangement.<sup>6</sup>

**C. Liberty Continues to Own and Control its Microwave Facilities.**

Contrary to the allegations in the Motion, since the closing of the transaction between Liberty and Freedom, Liberty has at all times maintained exclusive ownership and control of its licensed microwave operations. The Supplement points to Freedom's recent filing of applications for new OFS facilities as evidence that Liberty is somehow controlled by Freedom or its affiliates.<sup>7</sup> As discussed below, however, Liberty continues to own and control its existing OFS authorizations while Freedom expands its base of operations through the construction of its own wireless and wired facilities.

The Supplement notes that on April 11, 1996, Freedom filed eight applications for new OFS facilities.<sup>8</sup> The Supplement surmises that Liberty and Freedom are "under common ownership and control" because the applications were filed by Pepper & Corazzini

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<sup>5</sup> The Bureau was made aware generally of the buyer's regulatory status and position in the local and national telecommunications marketplace.

<sup>6</sup> See Declaration of Donna C. Gregg, attached hereto. Prior to discussing the proposed transaction, counsel for Liberty and for RCN agreed with Bureau representatives that the conversation would not include discussion of any matters subject to *ex parte* restrictions, including the contested licensing proceedings giving rise to this Hearing. *Id.*

<sup>7</sup> Supplement to Motion to Enlarge Issues at 5.

<sup>8</sup> *Id.* at 2.

(the law firm that handles Liberty's FCC licensing work) and the check for the filing fees was in the name of "Liberty."<sup>9</sup> As stated above, however, Freedom acquired the right to use the name "Liberty" pursuant to the asset purchase agreement. Indeed, the check for the filing fees lists Liberty as having a New Jersey address (the same as Freedom).<sup>10</sup> Moreover, it is not immediately apparent why Freedom's use of Liberty's counsel (as opposed to Freedom's counsel) would support Time Warner's allegations. In any event, Liberty initiated the planning and design process for the paths covered by the eight applications prior to consummation of the transaction with Freedom. Hence, it is logical to conclude that Freedom elected to use Liberty's counsel for the applications due to counsel's familiarity with the relevant paths. Notably, since the filing of those eight applications, Liberty's FCC licensing counsel has had no involvement with any FCC license applications (or any related filings) submitted on behalf of Freedom.<sup>11</sup>

On a going forward basis, Liberty's business is limited to the provision of microwave transmission services using its existing network. Liberty does not anticipate expanding this operation. Indeed, since consummation of the Liberty/Freedom transaction the only FCC

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<sup>9</sup> *Id.* at 3.

<sup>10</sup> *See id.* at "Attachment."

<sup>11</sup> Time Warner also takes issue with Freedom's shared use of certain Liberty transmission and reception equipment, although it concedes that FCC rules permit such shared use. *Id.* at 4. Section 94.19 of the Commission's rules permits two or more licensees to share the use of transmitting equipment under certain conditions, which Liberty and Freedom meet. Accordingly, it is plainly unreasonable to suggest that such sharing arrangements -- common throughout the wireless telecommunications services marketplace -- raise control issues.

filings made by Liberty pertain to service activation of paths for which applications previously have been filed.<sup>12</sup>

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<sup>12</sup> Because Liberty's role in the MVPD business acquired by Freedom has been reduced to that of a private carrier (using only its existing microwave facilities), Liberty retains certain personnel, on a contract basis, for the routine performance of various technical and maintenance services in connection with its network. These personnel are closely supervised by, and required to report to, senior Liberty management officials, who remain at all times ultimately responsible for the operations of Liberty's OFS facilities. Indeed, Peter Price, the President of Liberty, oversees the FCC licensing process and John Tenety, Vice President Operations, Milford Management (a company affiliated with Liberty) oversees the construction and operation duties on a day-to-day basis.

### III. CONCLUSION

Consistent with the foregoing, Liberty respectfully urges the Presiding Officer to deny the Motion.

Dated: New York, New York  
May 7, 1996

CONSTANTINE & PARTNERS

By: Robert L. Begleiter /MB

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May 7, 1996

## DECLARATION OF PETER O. PRICE

I, Peter O. Price, hereby declare, under penalty of perjury, as follows:

1. I am President of Bartholdi Cable Company, Inc., formerly known as Liberty Cable Company, Inc. ("Liberty").
2. Pursuant to an asset purchase agreement entered into February 20, 1996, Freedom New York, L.L.P. ("Freedom") acquired certain assets from Liberty, including Liberty's existing subscribers, certain assumed contracts, certain equipment and property interests used for the delivery of multichannel video programming, as well as the name "Liberty" and other intellectual property assets (the "purchased assets").
3. Liberty's OFS licenses and related transmission and reception equipment (the "licensed assets") were excluded from the transaction.
4. In consideration for the purchased assets, Liberty received an initial purchase price of \$25 million (plus reimbursement for certain construction costs), a promissory note for \$15 million (payable to the extent that Liberty or its marketing affiliate, LIVE, delivers to Freedom a certain number of subscribers), and a 19.9% ownership interest in the Freedom limited liability company.
5. The licensed assets remain entirely owned and controlled by Liberty's successor, Bartholdi Cable Company, Inc.
6. Liberty and Freedom also entered into a transmission services agreement pursuant to which Liberty, acting as a private carrier, provides Freedom with microwave transmission capacity, and Freedom pays Liberty a monthly fee.
7. Pursuant to the express terms of this transmission agreement, Liberty continues to own and control the FCC authorizations needed to provide the transmission services and continues to own and operate the necessary network transmission and reception equipment.
8. Since the closing of the transaction between Liberty and Freedom, Liberty has at all times maintained exclusive ownership and control of its licensed microwave operations.
9. Prior to consummation of the transaction with Freedom, Liberty personnel initiated the planning and design process for the microwave paths covered by the eight applications filed by Freedom on April 11, 1996.
10. Since the filing of those eight applications on April 11, 1996, Liberty's FCC licensing counsel has had no involvement with any FCC license applications (or related submissions) submitted on behalf of Freedom.

11. Currently, Liberty's business is limited to the provision of microwave transmission services using its existing network. Liberty does not anticipate expanding this operation. Since consummation of the Liberty/Freedom transaction, the only FCC filings made by Liberty pertain to service activation of paths for which applications previously have been filed.

12. Liberty retains certain personnel, on a contract basis, for the routine performance of various technical and maintenance services in connection with its network.

13. These personnel are closely supervised by, and required to report to, senior Liberty management officials, who remain at all times ultimately responsible for the operations of Liberty's OFS facilities.

14. In my capacity as President of Liberty, I oversee the FCC licensing process.

15. John Tenety, Vice President Operations, Milford Management (an affiliate of Liberty) oversees Liberty's construction and operation activities on a day-to-day basis.

Executed on May 7, 1996

A handwritten signature in dark ink, appearing to read "Peter O. Price", is written over a horizontal line.

Peter O. Price  
President

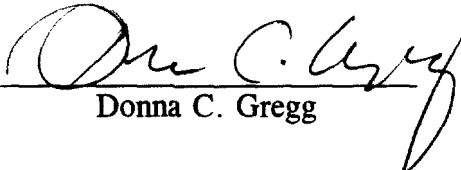
BARTHOLDI CABLE COMPANY, INC.  
f/k/a Liberty Cable Company, Inc.  
575 Madison Avenue  
New York, New York 10022

**DECLARATION OF DONNA C. GREGG**

I, Donna C. Gregg, hereby declare, under penalty of perjury, as follows:

1. I am an attorney with Wiley, Rein & Fielding.
2. While I assisted in the completion of the transaction between Liberty Cable Company, Inc., now known as "Bartholdi Cable Company, Inc." ("Liberty"), and Freedom New York, L.L.C. ("Freedom"), I generally am not involved in the WT Docket No 96-41 Liberty Hearing proceeding.
3. On January 25, 1995, on behalf of Liberty, I attended a meeting with representatives of the Wireless Telecommunications Bureau of the Federal Communications Commission. The meeting also was attended by counsel for RCN Corporation ("RCN").
4. Prior to discussing the proposed transaction, counsel for Liberty and for RCN agreed with Bureau representatives that the conversation would not include discussion of any matters subject to *ex parte* restrictions, including the contested license applications giving rise to this Hearing.
5. Counsel for Liberty and for RCN disclosed the basic terms of the proposed transaction with representatives of the Bureau. While not disclosing the identity of the proposed buyer or the purchase price, counsel informed the Bureau that Liberty proposed to enter into an asset purchase agreement for the sale of its subscribers and other assets. Counsel stated that Liberty would retain all of its microwave authorizations and related transmission and reception equipment, and would operate its microwave facilities on a private carrier basis for the benefit of the buyer.
6. The Bureau concurred with counsel that no FCC approval or notification would be required for the proposed transaction because no assignment or transfer of control of Liberty's microwave facilities would occur.

Executed on May 7, 1996

  
Donna C. Gregg

**Certificate of Service**

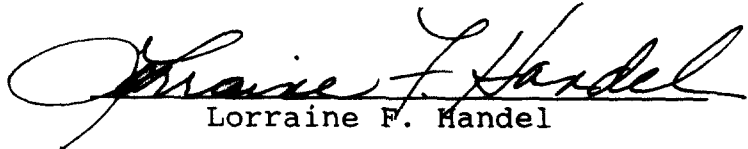
I hereby certify that on this 7th day of May, 1996, I caused copies of the foregoing "Bartholdi Cable Company, Inc.'s Opposition to Motion to Enlarge" to be sent via facsimile and first class, postage prepaid mail to the following:

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Lorraine F. Handel

\*     Hand Delivery